United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

12/30

74-2276

To be argued by
NORTON I. KATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Appellee,

—against—

MORTON L. ANNIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

RICH KRINSLY POSES KATZ & LILLIENSTEIN
Attorneys for Defendant-Appellant
99 Park Avenue
New York, New York 10016
867-7200

NORTON I. KATZ
LESLIE D. CORWIN
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

File No. 71 Civ. 782

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Appellee,

—against—

MORTON L. ANNIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

This is an appeal by the defendant from a final judgment of the United States District Court for the Southern District of New York, after trial, which judgment was filed on June 19, 1974 (A 457)* pursuant to a memorandum and order dated June 13, 1974 of the Hon. ROBERT L. CARTER, District Judge (A 444). Subsequently, after motion made by the plaintiff to amend the judgment with respect to computation of interest, an order was made by Judge Carter, dated September 11, 1974, by endorsement (A 459), and another

---

* References to pages of the Appendix are hereinafter designated by the prefix (A).

judgment incorporating the modification of the original judgment was filed October 2, 1974 (A 461). For precautionary reasons, the defendant-appellant filed a new Notice of Appeal from the modified judgment on October 15, 1974 (A 463).

The appeals under both Notices of Appeal are dealt with jointly in this brief, and the defendant-appellant respectfully requests the Court to consider the appeals from both judgments as a single consolidated appeal.

In this action plaintiff seeks to recover on two written instruments of guarantee alleged to have been "made, executed and delivered" by the defendant, Morton Annis, on September 30, 1969 and January 14, 1970 respectively.

The allegation is further made in the complaint that the payments guaranteed were for merchandise delivered by the plaintiff to a firm known as Intercontinental Wine & Spirits Ltd. and that the latter firm had failed to make the payments despite demand. The demand for relief is $150,000.00 together with reasonable attorneys' fees.

The defendant's answer denies the substantial allegations of the complaint while expressly admitting the making of an agreement between Intercontinental and the plaintiff whereby the plaintiff would act as an exclusive purchasing agent for Intercontinental in Europe and the United Kingdom. The execution of the respective agreements of guarantee by the defendant is expressly denied. The allegation of the complaint that Intercontinental owed a balance to plaintiff exceeding $150,000.00 was not specifically denied in the answer, but leave was granted at the trial to modify the pleading with respect to denial of that allegation (A 177-178).

The defendant's answer contained three defenses and counterclaims. The first alleged that on or about July 2,

1969, plaintiff purchased from Intercontinental convertible bonds for a purchase price of $40,000.00 and plaintiff issued a credit note in that amount to Intercontinental, which amount defendant would be entitled to credit in any event.

Defendant's second affirmative defense and counterclaim alleges that at least $60,000.00 worth of the merchandise charged against Intercontinental was unsaleable and excessively priced and that Intercontinental had rejected that merchandise.

Defendant's third affirmative defense and counterclaim alleges that the plaintiff and the defendant had themselves entered into an agreement whereby the plaintiff was to purchase spirits in Europe and the defendant was to market the same in the United States under terms whereby the net profit or net losses were to be shared equally by plaintiff and defendant.

This affirmative defense alleges further that the plaintiff's profit amounted to 14% and that the plaintiff had failed to account to the defendant or to pay the defendant any portion of the profit.

The relief demanded in the counterclaim is an accounting under the agreement between plaintiff and defendant and payment to the defendant by the plaintiff of all amounts determined to be due on such accounting.

The plaintiff filed a reply to the counterclaims alleging in substance that the alleged guarantee agreements had expressly waived any set-off, claim or counterclaim in favor of Intercontinental and otherwise denying the substantial obligations of the counterclaims.

A trial memorandum filed by the plaintiff with the Court (Document 26, Record on Appeal) admits:

"On October 16, 1968, an agreement was entered into between plaintiff and defendant individually, which provided that plaintiff and defendant would share the net profit or commission to be charged by plaintiff as purchasing agent upon the products to be ordered by defendant's distribution facility in the United States. The net profit would be determined after the expenses incurred by both parties." (P. 6 of Plaintiff's Trial Memorandum, *supra*).

The trial memorandum further admits:

"Plaintiff was then to assume the responsibility for the payment of such order by confirming the order with the supplier, and finally plaintiff, having paid for the initial order, would invoice Intercontinental, adding on a ten (10%) percent commission. Four (4%) percent of this commission was to be held by plaintiff as a credit for the account of Intercontinental, to be used for its expenses in Europe and the remaining six (6%) percent was, pursuant to the October 16, 1968 agreement, to be divided equally between defendant and plaintiff after deduction of various expenses." (P. 9 of Plaintiff's Post-Trial Memorandum, *supra*).

The matter was tried on October 9 and 10, 1973 before the Court, without a jury.

During the pre-trial proceedings the plaintiff moved for summary judgment on the second instrument of guarantee allegedly made January 14, 1970, and a decision was written by Hon. THOMAS F. CROAKE, District Judge, denying the motion (A 19).

This action grew out of a business arrangement for the importation and sale of various European alcoholic beverages in the United States. The arrangement also provided a method for assuring payment of the indebtedness of the United States purchaser to the plaintiff, and it is upon the alleged, and disputed, terms of these security provisions that this action is based.

The plaintiff, WEITNAUER TRADING COMPANY LTD., a Swiss corporation, alleges that it contracted to be purchasing agent for a corporation known as INTERCONTINENTAL WINE & SPIRITS LTD. (Intercontinental), a recently formed United States liquor distributor, in return for a commission on all goods shipped on credit to Intercontinental. The dispute arises from plaintiff's allegation that, on September 30, 1969, as an inducement for its extension of credit, the defendant MORTON L. ANNIS, SR., a holder of ten (10%) percent of the stock of Intercontinental, would, along with RONALD KASSIN, President of Intercontinental, guarantee payment of the latter's debts to plaintiff up to $100,000, plus interest, costs and attorneys' fees, without allowance of any counterclaims or set-offs. The Trial Court likewise had to resolve the disputed question whether the guarantee was, as plaintiff claimed, "amended" by a letter of January 14, 1974, claimed to have been signed by the defendant, by KASSIN, and by LEONARD FELLMAN, who was later to become President of Intercontinental.

The plaintiff claims that it shipped goods invoiced at a total amount of $134,496.20 and that only a nominal portion of this amount was paid, Intercontinental allegedly having defaulted in payment of the balance and admittedly having filed a Petition under Chapter XI of the Bankruptcy Act. One of the issues on this appeal is whether any competent proof of the amount of Intercontinental's indebtedness to the plaintiff was presented at the trial.

One of the basic defenses of this action is forgery. The defendant notes that a criminal complaint was lodged with the local District Attorney charging KASSIN with forgery in connection with another guarantee not herein involved. (Deposition of defendant, Document 10, Record on Appeal, pp. 24-25).

The trial exhibits further made reference to alleged embezzlements by KASSIN (Ex. 27; A 337; Ex. 38; A 452).

As noted earlier in this brief, the complaint of the plaintiff-appellee alleges that the "amendment" of January 14, 1970 increasing the guarantee amount to $150,000 was "made, executed and delivered to plaintiff Weitnauer Trading Company Ltd." by the defendant. At the trial, however, when plaintiff's counsel was asked whether it was plaintiff's contention that the "amendment" had been signed by the defendant himself, plaintiff's attorney replied that he did not know (A 113). After the plaintiff's own handwriting expert had testified that the signature on the "amendment" was not that of defendant, and that he had been told of that fact when requested to make his analysis (A 267) the Court itself concluded that there was no issue and that the signature was not that of defendant (A 268). In the memorandum decision below, the Court stated:

> "It is conceded that this letter was not signed by defendant, and no liability can be attached to him on a basis of that document standing alone." (A 449).

It was the defendant's claim throughout the trial that while he had at various times expressed a willingness to provide a guarantee for the performance of Intercontinental's obligations, he had never undertaken any guarantee in the form claimed by the plaintiff. The documentary proof indicates that, except for the two disputed documents sued on, the only writing embodying the terms of a

guarantee is a letter of September 22, 1969 (Ex. 10; A 308) which sets out in detail the defendant's proposal to extend an existing bank guarantee of $100,000 to cover additional shipments to be made by plaintiff to Intercontinental; it also reflects a $40,000 credit which will be hereinafter referred to, given by plaintiff to Intercontinental.

The next subsequent document relating to the alleged guarantee is Exhibit 37 (A 350) written by the defendant under date of January 18, 1971, containing the language quoted by the Trial Court in its memorandum opinion (A 450).

Following the last mentioned exhibit, the defendant under date of February 19, 1971 (Ex. 39; A 354) wrote to an officer of the plaintiff, in which defendant stated:

> "I have never signed any guarantee with you or with any supplier."

The defendant individually, and the plaintiff, had entered into a Memorandum Joint Venture Agreement, dated October 16, 1968 (Ex. 1; A 292) under the terms of which certain spirits were to be trademarked and sold to importers in the United States with net profits or net losses to be shared equally by defendant and plaintiff. It is undisputed that plaintiff never rendered any account to defendant under that instrument.

On July 2, 1969, plaintiff purchased convertible bonds of Intercontinental for $40,000, but instead of paying in cash for these bonds, issued its July 2, 1969 credit note in the amount of $40,000 (Ex. 7A; A 304). The terms of the purchase are outlined in Ex. 7 (A 302).

The Questions Presented

1. Was there a failure of competent credible proof that appellant ever signed the September 30, 1969 guarantee (Ex. 14; A 316)? The Court below held that there was not (A 451). Appellant contends there was a failure of such proof.

2. Was there a failure of competent proof rebutting appellant's position that he never authorized the affixing of his purported signature to the January 14, 1970 "amendment" of the guarantee? The Court below did not specifically answer this question, stating instead that: (A 452).

> "Defendant's further responsibility for *inducing plaintiff* to advance monies in excess of the original $100,000 guarantee has also been established by a fair preponderance of the evidence." (Emphasis ours).

Appellant contends there was no competent proof of an authorization by appellant to affix his signature to the guarantee alleged in the complaint. Appellant further contends that the Court below acted erroneously in relying instead on a finding of appellant's "responsibility for inducing plaintiff to advance monies in excess of the original $100,000 guarantee * * * "

3. Did appellant, by any acts or conduct, admit that he had committed himself to the guarantee alleged in the complaint and offered in proof at the trial? The Court below held in the affirmative. Appellant contends that the decision below erroneously relies on a series of communications, not all competent and none probative of the issue, to support the finding: (A 452)

"* * * these referred to communications, the authorship of which is not disputed, constitute an admission that he committed himself to the $150,000 guarantee for which he is being sued."

4. Was the Statute of Frauds satisfied by the separate writings of the parties read together? The Court below found in the affirmative and appellant contends that that finding was erroneous as a matter of law and not supported as a matter of fact.

5. Is the appellant estopped from denying that he had committed himself to a $50,000 enlargement of the guarantee by any subsequent contacts with the appellee or by any failure to raise an issue concerning the genuineness of his signature? The Court below held that appellant is so estopped and the appellant contends that that holding is erroneous in law and fact.

6. Was the Court below in error in holding that the $40,000 credit note should not be allowed to Intercontinental's credit in determining the amount to which the alleged guarantee applies? The Court below held that such credit was not available because the bonds were not issued, there was no reference to them in any of the documents evidencing the guarantee, and the guarantee specifically bars any set-offs or counter-claims as to Intercontinental. The appellant contends that the Court's holding is erroneous as a matter of law and in the facts found to support the Court's conclusion.

7. Was the Court's rejection of appellant's argument that the "guarantee" referred to in the appellant's correspondence referred to a guarantee to a New York bank based upon the Court's speculation and conjecture unsup-

ported by evidence and therefore erroneous? Appellant contends it was erroneous in those respects.

8. Was there any competent proof of the amount owed to appellee by Intercontinental? The Court below refers only to a copy of a ledger of appellee as the only record support for appellee's claim of damages. Appellant contends that the offered proof was incompetent, objection was timely taken, and the Court's finding of fact had no support in the record.

Jurisdiction of the Court Below

The jurisdiction of the court below is founded upon diversity of citizenship pursuant to 28 U.S.C. §1332.

POINT I

There Is No Competent Proof That Defendant Authorized The Placing Of His Signature On Exhibit 20, Or That The Signature Was So Placed By Any Authorized Person.

In an effort to escape the failure of proof of the complaint allegation that the defendant Annis signed Exhibit 20, the plaintiff attempted to prove a verbal authorization by the defendant, running to Messrs. Fellman and Kassin for such signature. That attempt appears in the direct examination of Kassin on his deposition (Exhibit 43, page 16); (A 391) also at (A 118-119).

It is unnecessary to belabor the point that even on that weak attempt to prove an authorization, the conditions that defendant, Mr. Annis be out of town or out of state had not been met. Nor is it necessary to belabor the point that the only reasonable interpretation of such an au-

thorization, if it had been given, would be that his signature could be affixed as to corporate matters rather than to a personal guarantee imposing joint liability, free of counterclaims or set-offs and subject to multiple other conditions. The reason it is unnecessary to go into these points is that the undisputed testimony demonstrates that Kassin never signed the instrument on Mr. Annis' behalf, and the only testimony that Fellman signed it is incompetent and objection thereto was sustained by the Court (A 117-118; Exhibit 43, page 16):

> "MR. KOVNER: 'Q. Did you witness the affixation of the name Morton Annis to that document by Leonard Feldman?'
>
> 'A. I don't remember.'
>
> 'Q. How do you know that it was Mr. Feldman who signed it?'
>
> 'A. Mr. Feldman at that time informed me that he had signed it because Mr. Annis was not available.'
>
> MR. KATZ: I object to that on the ground that it's hearsay.
>
> THE COURT: All the objections to me seem to be well taken. All right.
>
> MR. KOVNER: I'm sorry.
>
> THE COURT: The objection was on the ground of hearsay and that objection is well taken."

Consequently, there is no competent proof in the record that the particular authorization attempted to be proved, was ever given; and the entire issue of authorization must fall on that point alone.

The Court recognized the absence of evidentiary proof of the auhtorization by stating (A 119-120):

"THE COURT: Well, I'm going to allow it in. I'm not sure at the present time, unless there is some stronger evidentiary proof of his authorization given, I'm not sure that I'm going to give this document, as far as his signature is concerned, very much credence. In order for you to continue on with the case, I'll let it in, with the caveats I've just mentioned. I don't think it's worth much at the present time."

The Court's requirement of further evidentiary proof in support of the authorization was never met.

POINT II

The New York Statute Of Frauds, In Any Event, Renders Exhibit 20 Unenforceable.

Even if there had been an iota of competent proof of the affixing of defendant's signature by Fellman or Kassin, the instrument could not be enforced against the defendant because it is unenforceable under the New York Statute of Frauds. (General Obligations Law, §5-701);

"Every agreement, promise or undertaking is void, unless it or some note or memordanum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

* * *

2. Is a special promise to answer for the debt, default or miscarriage of another person."

There is no proof, nor was there any attempt to prove, that either Fellman or Kassin were, either verbally or in writing, authorized to sign the particular instrument con-

stituting Exhibit 20, nor indeed any guarantee or particular document.

The record is utterly bare of any such evidence, and in fact, the only suggestion that any power of signature was granted is contained in the Kassin deposition on pages 15 and 16 of Exhibit 43 (A 390-391), as follows:

> "Q. Did Mr. Annis, during the period that you served as president of Inter/Continental, authorize any of the officers of Inter/Continental to sign his name to documents?
>
> A. Yes.
>
> Q. How was that authorization granted?
>
> A. At one time, in a discussion with Mr. Annis, Mr. Fellman and I were both told that if he was out of town or out of state, that if anything came up, that we could sign his name.
>
> Q. Would that authority have to be checked with him by phone so that he was aware of what the document was?
>
> A. I don't believe so. I think that was pretty much of a blanket statement."

However, on re-direct examination, plaintiff's counsel abortively attempted to perfect the omission and to prove an authorization by Mr. Annis to sign Exhibit 20. Again, the answer was incompetent and objection was taken. (Exhibit 43, page 34).

> Q. How do you know that it was Mr. Fellman who—
>
> A. Mr. Fellman showed me the document and told me that he had Annis' approval to sign it, and that he had signed it because Mr. Annis was somewhere else, and I don't remember where."

Finally, on recross-examination, Kassin testified (Exhibit 43, page 41-42):

> Q. Now, when Mr. Annis said if something came up you could sign his name, was that the extent of the authorization, or was he more specific than that?
>
> A. I would say it was basically that.
>
> Q. It was basically that?
>
> A. Yes.
>
> Q. Did you interpret that to mean that either you or Mr. Fellman was authorized to sign personal guarantees on behalf of Mr. Annis?
>
> A. I didn't interpret it any way, because I didn't sign the personal guarantee.
>
> Q. Did Mr. Annis ever tell you specifically that you were authorized to sign his name to any documents which would expose him to personal liability?
>
> A. No."

and also on page 43:

> A. When we were told that we could sign his name, there was no stipulation as to what we could do or what we couldn't do.
>
> Now, I don't know if that answers the question, but that has got to be my answer."

The Statute of Frauds is therefore a complete bar to any recovery on Exhibit 20, and plaintiff never succeeded in establishing any fact which might have exempted him from the operation of the Statute.

Any authorization to an agent, even if written, to sign an instrument which is required to be in writing must be

shown to be referrable at the very least, to a "determinable class of transactions."

Commission on Ecumenical Mission, etc. v. *Roger Gray, Ltd.*, 27 N.Y. (2d) 457 (1971) *cf. Hamilton Park Builders Corp.* v. *Rogers*, 4 Misc. (2d) 269, 156 N.Y.S. (2d) 891 (Sup. Ct., Queens Cty., 1956).

POINT III

Ratification By Defendant Was Not Established, As A Matter Of Law.

The only evidence which specifically refers to the terms of the alleged $50,000.00 guaranty is in Exhibit 39 (A 354) in which the defendant Annis states:

> "I at no time stated that you could call upon me for a payment of $150,000 to cover the debt of Inter/Continental. This was never done in writing or orally. I have never signed any guaranty with you or with any supplier. (Incidentally, I will tell you that Mr. Kassin forged my name to a document with Wertheimer and prosecution is now being carried on in the State of New York.)"

The decision below relies on the fact that this was the first time such repudiation was expressly made by Mr. Annis. But this overlooks the fact that plaintiff's own witness testified (Exhibit 43, page 25) (A 400):

> Q. When, to your knowledge, did Mr. Annis first become aware of the signing of this document known as Exhibit B?
>
> A. I don't know when he became aware of it.

Q. To your knowledge, did Mr. Annis ever see this document before this case was commenced?

A. No."

In point of fact, the plaintiff's proof shows (Exhibit 21) that, on January 19, 1970, five days after the purported execution of Exhibit 20, the defendant Annis was unaware that the instrument bearing his name, had been executed. Otherwise, what explanation is there for his writing to plaintiff on January 19th, speaking of the awaited financial statement and expressing his willingness to raise "the guaranty" to $150,000. (The meaning of the words "the guaranty" will be discussed later in this Brief).

Further, plaintiff's failure to seek clarification of this inconsistency indicates that no such inconsistency actually existed. Annis never knew of the instrument's execution or terms. The cross-examination of the witness Meier is illuminating on this point. (A 209, folio 9-22):

Q. On January 23rd or 25th when you received Exhibit 21 and you read the language, 'I am certainly in agreement to raise this to $150,000,' did you at that time consider writing to him and saying, wait a minute, you have already signed a document of January 14th which agreed to raise it to $150,000?

A. No.

Q. You didn't consider writing to him in that respect at all?

A. No.

Q. I take it the answer is no?

THE COURT: He said no, Mr. Katz.

A. No.

It is clear, as a matter of law, that ratification can only be significant if based on knowledge of the instrument ratified and it must contain all the terms of the unsigned instrument.

> *Solin Lee Chu* v. *Ling Sun Chu*, 9 App. Div. (2d) 888, 193 NYS 2d 859 (1st Dept. 1959); aff'd. 14 NY (2d) 606 (1959);
>
> *Behrman* v. *People's Camp Corp.*, 30 App. Div. (2d) 973, 294 NYS 2d 658 (2d Dept. 1968); aff'd. 25 NY 2d 920 (1969);
>
> *Brause* v. *Goldman*, 10 App. Div. (2d) 328, 199 NYS 2d 606 (1st Dept. 1960); aff'd 9 NY 2d 620 (1961);
>
> *Schenectady Trust Co.* v. *Castelli*, 25 Misc. (2d) 155; 209 NYS (2d) 739 (1960).

"To constitute a ratification of an agreement, it must appear that what the party does was done with full knowledge of all the facts."

> *Knapp* v. *Rochester Dog Protective Association*, 235 A.D. 436, 257 N.Y.S. 356, 360 (4th Dept. 1932).

The principal must have knowledge of the material facts and circumstances and must have acted in the light of such knowledge. *First Nat.-Bank of Morrisville* v. *Starke Design, Inc.*, 11 A.D.2d 595, 200 N.Y.S.2d 708 (3rd Dept., 1960). *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58 at 70 (1920).

Furthermore "* * * it is questionable whether a forgery of an instrument can ever be ratified * * *". *First Natl. Bank of Morrisville*, supra, at p. 710.

The Court below, therefore, erred when it relied, in its findings on the fact that "At no time did he (defendant) disabuse plaintiff of the impression that he had in fact signed the document" (A 454) and on the unsupported and unrebuttedly contradicted finding that "Only after this litigation did defendant raise issue concerning the genuineness of his signature" (A 454) [Obviously Ex. 39, (A 354) preceded the litigation].

In fact, the Court below erred in that it never squarely formulated a finding that any of the cited requirements of law had been met by the proofs. Instead, the Court couched its finding and conclusion in these terms:

> "Defendant's further responsibility for inducing plaintiff to advance monies in excess of the original $100,000 guarantee has also been established by a fair preponderance of the evidence."

POINT IV

The Court's Finding Of Ratification By Subsequent Letter Or Memorandum Is Insufficient, Both As To The Statute Of Frauds And As A Matter Of Evidence.

There was no dispute at the trial that the only communication received by Weitnauer from defendant, before September 30, 1969, concerning the alleged "guaranty", was Exhibit 10, (A 308) which spoke of a bank guaranty and proposed:

> "We will extend this guaranty to cover the shipments in question so that we can start merchandise flowing across the ocean immediately."

Furthermore, the financial statement of defendant on which the plaintiff relies, was submitted in connection with,

and attached to Exhibit 10, and that was the only occasion on which any guaranty was described or any financial statement furnished by defendant.

There was no further discussion of the terms of the guaranty at all up to the meeting at the 21 Club when Annis refused to sign the document (Exhibit 14) which is now in issue in this case. (A 165, folios 8-19).

The plaintiff's own witness, Meier, testified (A 196, folio 13-16):

> "Q. Now, there's no doubt in your mind, is there, that the only financial statement that was every (sic) given by Mr. Annis was given in connection with Exhibit 10?
>
> A. Yes.
>
> Q. There is no doubt?
>
> A. No doubt."

Referring to the subsequent correspondence, on which the decision below is based, Judge Croake found that the view that these admissions of the existence of a "guarantee" referred to the bank guarantee was "entirely possible". (Decision of February 2, 1972, page 5.) (A 23.)

The documents relied on so heavily by the plaintiff and the Trial Court are Exhibit 37, letter dated January 18, 1971; Exhibit 19, letter of January 13, 1970; Exhibit 35, letter of December 31, 1970; and another letter of January 18, 1971, Exhibit 36.

All of these documents speak only of a "guarantee"; at a time when the only written guarantee by defendant shown by any competent evidence was Exhibit 10, relating to the bank guarantee.

Exhibit 19, the plaintiff's letter of January 13, 1972, is directed towards obtaining from defendant information about the financial position of Inter/Continental and speaks of the fact that "they" are prepared to increase the "guarantee" from $100,000 to $150,000.

The response to the letter, Exhibit 19, is also significant in that defendant's January 19, 1970 reply, as previously noted, expresses a willingness to extend "this", without further specification, to $150,000. This was five days after the alleged signature of defendant on the $50,000 modification of the guarantee (Exhibit 20).

Exhibit 35 again speaks only of $150,000 "guaranteed by you" and is as consistent with Exhibit 10 as with Exhibits 14 and 20.

Exhibit 36 refers only to "the guarantee" and states "there are very definite limitations on this guarantee", which is only consistent with Exhibit 10 and not with Exhibit 20.

Exhibit 37, the letter of January 18, 1971, is utterly inconsistent with Exhibits 14 and 20. First of all, Fellman's signature does not appear on Exhibit 14; secondly, there is no $60,000 credit term (as referred to in Exhibit 37) embodied in either Exhibits 14 or 20; and finally, again all that is referred to is "the guarantee" without further specification.

Exhibit 37 is also significant because it mentions the $40,000 credit which was not reflected in the alleged ledger when produced by the plaintiff and which was disputed by plaintiff until defendant produced the actual credit note (Ex. 7-A; A 304). It should be added that there was no contrary proof offered by the plaintiff either as to the issuance of the credit note nor the fact that it was issued

in satisfaction of $40,000 of the first $100,000 of credit extended to Inter/Continental.

Exhibit 38 is plaintiff's personal letter to Adolphe Weitnauer expressing "surprise" at a lawyer's letter apparently dated January 12, 1971, which does not refer to any guarantee at all by defendant. It does deal with the embezzlement activities of Kassin and of liquidating the debt of Inter/Continental. The contents of Exhibit 38, however, are inconsistent with defendant having any view that he might be liable as a primary obligor or a guarantor. If he had any such idea, it is difficult to believe he would find it necessary to write:

> "Do not think for one moment that any of us are indifferent to the obligations of Inter/Continental to your company."

The "lawyer's letter" referred to in Exhibit 38 and replied to in Exhibit 36, was never placed in the record by the plaintiff. We can therefore make no reference to it other than the fact that its introduction would apparently have cast no light on what "guarantee" Mr. Annis was speaking of in Exhibit 36, the replying letter.

A ratifying document, in order to provide the memorandum required by the Statute of Frauds, must contain all of the essential terms of the agreement it purports to confirm. In this case, there is at least an ambiguity as to the meaning of the word "guarantee" in the purportedly confirming letters and none of the writings, either separately or collectively, sets out the terms of the agreement which the plaintiff is here seeking to enforce. Exhibit 10, as noted earlier, contains the only terms of "guarantee" included in the record, other than the two documents whose execution was disputed. This, as a matter of law, cannot constitute ratification or support an implication of author-

ity. *Schenectady Trust* v. *Castelli*, 25 Misc. 2d 155, 200 N.Y.S. 2d 739 (1960).

Failing such compliance, the agreement remains unenforceable.

Ginsberg Machine Co., Inc. v. *J. & H. Label Processing Corp.*, 341 F.2d 825 (2nd Circuit 1965);

Scheck v. *Francis*, 26 N.Y.2d 466 (1970);

Olympic Junior Inc. v. *Davis Crystal Inc., et al*, 463 F.2d 1141 (3rd Circuit 1972) and cases cited.

R. D. O'Connell & Assoc., Inc. v. *Thompson-Starrett Construction Co.*, 28 A.D.2d 984, 283 N.Y.S.2d 653 (1st Dept. 1967).

POINT V

The Court Below Erred In Holding That Exhibit 19 And Exhibit 21, Read Together, Are Sufficient To Satisfy The Statute Of Frauds.

The Court below, in its Decision, constituting its required findings and conclusions, stated: (A453)

"The statute of frauds is satisfied where separate writings are connected with one another or by the internal evidence of the subject matter, or where the occasion can be pieced together to provide all the essential terms of the agreement, and the result evidences an *in praesenti* intent of the parties to form a binding agreement. The plaintiff's January 13, 1970, letter and the defendant's January 19, 1970, reply read together are sufficient to meet that test of the statute of frauds. *See Crabtree* v. *Elizabeth Arden Sales Corp.*, 305 N.Y.

48 (1953); *Brause* v. *Goldman,* 10 App. Div. 2d 328 (1st Dept. 1960, *aff'd* 9 N.Y. 2d 620 (1961); *Lalonde* v. *Modern Album & Finishing Co.,* 38 App. Div. 2d 960 (2d Dept. 1972)."

It should first be noted that defendant took timely objection to Exhibit 21, on the ground that the signature of defendant was not established and no proper foundation was laid (A 124). The Court overruled the objection (A 125). The Court's reliance on the incompetent document is crucial, as evidenced by the quoted portion of its decision; and the record is bare of any evidence which would render the document admissible as having been made or signed by defendant.

Further, even if the exhibit were competent, the two exhibits taken together do not satisfy the Statute of Frauds, for they fail to show what the Court itself accepts as a requirement, that is that:

"* * * the result evidences an *in praesenti* intent of the parties to form a binding agreement."

The two letters, at their most favorable outlook to plaintiff, evidence nothing more than an *in futuro* intent to form an agreement. Exhibit 19 states that Inter/Continental "is prepared" to increase the guarantee. Exhibit 21, even if competent, shows only that the requested financial statement will be ready "very shortly" and expresses defendant's willingness to raise "this" to $150,000. The "this" referred to, aside from its *in futuro* reference, can only refer to the *Inter/Continental* guarantee referred to in Exhibit 19. That exhibit contains no reference to a personal guarantee by defendant, it refers only to Inter/Continental's guarantee which "they" are "prepared" to increase.

The Court below, therefore, erred in relying on these two documents to satisfy the Statute.

Crabtree v. *Elizabeth Arden Sales Corp.*, 305 N.Y. 48 (1953) is expressly distinguishable from the instant case. As stated in *Solin Lee Chu* v. *Ling Sun Chu, supra,* (193 N.Y.S. 2d at p. 860):

> "Unlike the situation in the Crabtree case (supra) the document here offered was not prepared by the defendant or at his instance. On the contrary it was prepared by the plaintiff's attorney and offered to the defendant for signature but he refused to sign. In the Crabtree case all of the writings relied upon—which when taken together contained all of the essential terms of the agreement—were documents of the defendant and prepared by the defendant. To permit the unsigned document prepared by the plaintiff to serve as a portion of the requisite memorandum would open the door to evils the Statute of Frauds was designed to avoid."

It is likewise noteworthy that *Brause* v. *Goldman*, 10 A.D. (2d) 328, 199 N.Y.S. (2d) 606, affd. 9 N.Y. (2d) 620 (1961) cited by the Court below (A 453) expressly distinguishes the case where a confirmatory writing fails to express an "agreement *in praesenti.*" It was, therefore, a further compounding of errors for the Trial Court to find that the two exhibits, 19 and 21, are sufficient to meet the test that they "evidence(s) an *in praesenti* intent of the parties to form a binding agreement."

Supporting the distinction of the *Crabtree* case enunciated in *Brause,* supra, is *Ideal Structures Corp.* v. *Levine Huntsville Develop Corp.*, 396 F.2d 917 at 928 (5th Cir. 1968).

POINT VI

The Plaintiff Has Not Met The Required Burden Of Proof As To The $100,000 Guaranty.

Taken at its most favorable intendment to plaintiff, the proof is, at the very least inconsistent, and, from the standpoint of plaintiff's burden of proof, insufficient.

The only proof in the record that defendant signed Exhibit 14, the $100,000 "guaranty," appears in the testimony of Ronald Kassin (Exhibit 43). In evaluating the quality of this proof, the Court should take judicial notice of its own records; in particular, the affidavits submitted on the plaintiff's motion for summary judgment. Judge Croake, in his decision, noted that Kassin had been charged with forgery of an unrelated guarantee. (Decision on Motion, February 2, 1972 page 3) (A 21). Exhibit 39 also refers to this fact, as does Exhibit B to plaintiff's reply papers (Ex. 27; A 337). See (A 135, folio 2-8).

On the motion for summary judgment, the factual issue, which the Court held precluded summary judgment, was whether it was the defendant or Kassin who signed the guarantee. (Decision of February 2, 1972, p. 5) (A 23). Kassin's testimony on his deposition must, therefore, be viewed as that of a witness intensely interested in denying forgery. (It should be remembered that Mr. Fellman, by Kassin's own admission, was not present at that time, so the signature could not be attributed to him by Kassin (Ex. 43, pp. 22-23).

Nor is it any answer to say that the Trial Court was in a position to evaluate Kassin's veracity by observing his testimony and demeanor; his testimony was offered only by deposition.

Further, there is proof by plaintiff's own witness in the record that, when a document identical to Exhibit 14 was presented to defendant Annis for signature, he would not sign it. (A 87, fols. 11-19).

Again, the purported signature of defendant was affixed, allegedly, in the presence of a Mr. Keiser, who signed as a witness. The plaintiff had Keiser under subpoena, subject to telephone call (A 285-286). The issue of the signature on the document was primary before the Court. Yet, the plaintiff released Keiser of the obligation to testify, and he did not appear. This, despite the fact that, until 2 a.m. of the same day, Keiser was still under subpoena (A 283-284). While the writers of this brief recognize that Keiser could also have been subpoenaed earlier by defendant, the fact remains that so material and disinterested a witness, under subpoena by plaintiff, who very well might have resolved this major issue, was released by plaintiff's own counsel from the subpoena, and his testimony entirely left out of the plaintiff's case. Plaintiff, after all, bore the burden of proof.

Furthermore, the testimony offered by plaintiff through the highly vulnerable witness, Kassin, was that the signed instrument was delivered to plaintiff's New York counsel, Harry A. Gottlieb, Esq.

The circumstances "surrounding the signing of the guarantees" were determined by Judge Croake (Decision of February 2, 1972 page 5) (A 23) to be a factual issue of which the record "is devoid". Yet, although Mr. Gottlieb was "alive and well", (A 203), and was a member of the firm of attorneys for plaintiff, his testimony was never offered by the plaintiff. It needs no citation to show that the trier of fact may view the failure to call him as evidence he would not have testified favorably to the party with whom he had such a relation. We submit it was

erroneous for the Court below to find that the guaranty was in fact signed by defendant in such circumstances.

Additionally, even in Kassin's testimony, he first testified that, as to the defendant's signature, he "believed" the purported signature to be that of Annis, but as to the signature of Keiser "that I know is Howard Keiser's" (Exhibit 43, page 9) (A 384). It was only after repeated leading questioning by plaintiff's counsel that Kassin finally said he had personal knowledge of the actual signing by Annis. (eg; Exhibit 43, page 10) (A 385).

Finally, the plaintiff's expert witness himself found a difference in the signature on the guarantee from known signatures of the defendant:

> "However, at some point in time some one has added a second beginning stroke" (Exhibit K, page 4). (A 442)
>
> also
>
> "and that record or additional stroke gives the signature a sort of patched appearance". (A 464, fols. 7-8).
>
> "Q. Now, one of the factors that you used in coming to the conclusion that the signature on Exhibit 14, despite this difference that you have just described, was in fact the signature who had signed the admitted signatures was that there was no evidence that clearly points away from genuineness. Isn't that one of the factors you used?
>
> A. Yes.
>
> Q. And had there been any evidence that pointed away from genuineness would that have effected your judgment as to whether this was or was not the signature of Mortin Annis?

A. Yes, it certainly would have effected the ultimate opinion that was reached." (A 464, fols. 9-21).

POINT VII

The Court Below Erred In Refusing To Allow The $40,000 Credit Note (Ex. 7A) To Diminish The Guaranteed Indebtedness.

The Court summarily disposed of defendant's claim that Inter/Continental's indebtedness, the subject of the alleged guarantee should be reduced by the $40,000 amount of the credit note issued by plaintiff. The District Court said:

> "The counterclaim alleging that $40,000 of the amount in question was for Intercontinental convertable bonds is without merit. Those bonds were never issued. There is no reference to them in any of the documents evidencing the guarantee; and indeed, the guarantee specifically bars any set-off or counterclaims as to Intercontinental."

The credit note Exhibit 7-A (A 304) is, on its face, unconditional, advising Intercontinental, in three languages:

> "We inform you that we have made the following entries to the CREDIT of your account." (Capitalization in original).

The Court was further in error in stating that there was no reference to the bonds in any of the documents allegedly evidencing the guarantee. The record shows that Exhibits 7, 18, 37 and 39 all refer to the $40,000 bonds; these were among the documents allegedly "evidencing the guarantee."

Finally, the Court's view that the credit note was unavailable to reduce Intercontinental's indebtedness is like-

wise erroneous. Plaintiff's proof of the debt consisted only of an alleged record of an open account, as set forth in a ledger. That account failed to include an amount of $40,000 which plaintiff had, in writing, stated it had "credited to your account." The defendant's claim that the account as presented in Court was inaccurate is not changed in character to a "set-off or counterclaim" by the mere fact that it relies on a credited, rather than a debited, amount.

A set-off, as distinguished from a reduction or recoupment, must arise from a different or separate contract than bases a creditor's claim.

> *Black's Law Dictionary,* Revised Fourth Edition (1968), pp. 1439-40; 1538;
>
> *Otto* v. *Lincoln Savings Bank of Brooklyn,* 268 A.D. 400, 51 N.Y.S. (2d) 561, 563 (2d Dept, 1944).

An account, by its very nature, is "a detailed statement of the *mutual* demands in the nature of *debt and credit* between parties * * *" (Emphasis ours).

> *Black's Law Dictionary, supra,* at p. 34;
>
> *Harnischfeger Sales Corp.* v. *Pickering Lumber Co.,* 97 F.2d 692, at 695 (8th Cir. 1938).

"Recoupment" is to be distinguished from set-off and, in speaking of matters of defense, is often used as synonymous with "reduction".

> *Black's Law Dictionary, supra,* p. 1440.

POINT VIII

The Record Is Bare Of Any Competent Evidence Of The Amount To Which Plaintiff Would Be Entitled If There Were A Valid Guarantee.

The only evidence of Intercontinental's indebtedness that the plaintiff was able to introduce were photocopies of the alleged ledger sheets (Exhibit 15; A 319). Objection was taken on the ground that the photocopy was not the best evidence. That objection was over-ruled (A 101).

Yet the proof, on cross-examination, showed that the 50-50 split of expenses and net profit or net losses, shown by Exhibit 1, was not shown on Exhibit 15 (A 169, folios 5-21). The commissions that were received by Weitnauer were included in the listing of prices on Exhibit 15, but the amount thereof was not shown in Exhibit 15, but in a "separate calculation" which was possibly in Switzerland (A 171).

The calculation could be made only on an invoice by invoice basis, not shown on Exhibit 15, and the plaintiff's witness only had two of the invoices with him (A 172).

There was a special procedure whereby, in certain instances, one brand of whisky was purchased in bulk and re-bottled. Thus, in fact, it was being purchased by plaintiff for its own account and re-sold to Inter/Continental (A 176; also A 179). Plaintiff's witness was unable to say, except as a "guess" what portion of the total invoices shown were included in that group and it could not be read from the ledger (A 177).

The witness referred to defendant's Exhibit A (A 425) to finally come up with some figures as to the amount of sales of the particular brands of whisky that Weitnauer

rebottled and charged to Inter/Continental (A 178). But on cross-examination he testified that there was nothing in Exhibit A which indicates the amounts that were actually paid by plaintiff on supplier's invoices.

In response to its question whether there were any instances in which the amount paid to a supplier was less than the amount listed in Exhibit A, the witness answered that there was, and he named Wilson Bonding, describing the procedure whereby it was necessary to add to the price the cost of corks, capsules, labels and cartons (A 185).

The record of payment of the invoices by suppliers to Weitnauer, which were the only charges for which Inter/Continental was responsible, was not in the courtroom at all; and the only evidence was the witness' testimony that, except for the specific instances mentioned and his estimate of the percentage involved, all other suppliers had been paid (A 186). The record of that payment was in Switzerland (A 186).

Despite the fact that he had testified on direct examination that there was no discussion of broken, unlabeled and short shipments at the 21 Club meeting (A 191, folios 14-22), on cross-examination the witness Meier testified that he couldn't remember (A 193).

The $40,000 credit note (Exhibit 7-A) was not reflected on Exhibit 15.

Since the only evidence in the record concerning the amount owed by Inter/Continental, and allegedly guaranteed by the defendant, is contained in Exhibit 15, the plaintiff has failed in its burden of proving damages. Judge Croake, in his decision on the motion for summary judgment, had Exhibit 15, as it existed up to the date of the complaint, before him. Yet, he said with respect to the

defendant's defense that Inter/Continental was in fact not indebted to the plaintiff:

> "The absence of various material facts from the record in this regard makes it impossible to evaluate this defense." (Decision of February 2, 1972, page 5) (A 23).

Plaintiff never corrected this deficiency.

CONCLUSION

The decision below should be reversed because:

1. There was a failure of competent proof that defendant ever signed the "guarantee", Ex. 14.

2. There was a failure of competent proof that defendant ever authorized the placing of his purported signature on the $50,000 amendment of the guarantee, Ex. 20.

3. The Court below erred in finding that defendant had admitted, by a series of communications, that he had committed himself to the $150,000 guarantee for which he is being sued.

4. The Court below erred in holding that the Statute of Frauds was satisfied by the parties' several writings.

5. The Court below erred in holding defendant estopped to deny the genuineness of his signature.

6. The Court below erred in holding that the $40,000 credit note issued by plaintiff should not be deducted from the indebtedness of Intercontinental and defendant's alleged guarantee.

7. There was no competent proof of the amount owed by Intercontinental to plaintiff.

Respectfully submitted,

Rich, Krinsly, Poses, Katz &
Lillienstein
Attorneys for Defendant-Appellant
99 Park Avenue
New York, New York 10016
867-7200

Norton I. Katz
Leslie D. Corwin

Of Counsel

Service of 2 copies of this within

Brief is admitted this

30 day of December 1974.

Mitchell Gottlieb Taylor & Howard

ATTORNEY FOR Plaintiff-Appellee

MEILEN PRESS INC. — N. Y. C. 219